

OLC 74-1233
12 June 1974

MEMORANDUM FOR THE RECORD

SUBJECT: H. R. 12471 - Amendments to Freedom of Information Act

The conferees appointed to consider H. R. 12471 are as follows:

SENATE

Edward M. Kennedy, (D., Mass.)
Philip A. Hart, (D., Mich.)
Birch Bayh, (D., Ind.)
Quentin Burdick, (D., N. Dak.)
John V. Tunney, (D., Calif.)
John L. McClellan, (D., Ark.)
Strom Thurmond, (R., S. Car.)
Charles Mathias, (R., Md.)
Roman L. Hruska, (R., Neb.)

HOUSE

Chet Holifield, (D., Calif.)
William Moorhead, (D., Pa.)
John Moss, (D., Calif.)
William Alexander, (D., Ark.)
Frank Horton, (R., N. Y.)
John Erlenborn, (R., Ill.)
Paul N. McCloskey, (R., Calif.)

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[Redacted]
Assistant Legislative Counsel

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COURT REVIEW

The Senate bill amended exemption (b)(1) to include information which is specifically required by statute to be kept secret in the interest of national defense or foreign policy. Presently, exemption (b)(1) includes only information which is required to be kept secret pursuant to Executive Order. The House reworded exemption (b)(1) but did not expand it as did the Senate to include statutory protection. Rather, the House report noted that information requiring protection by statute, such as Restricted Data (42 U.S.C. 52162), would still be protected under exemption (b)(3) "specifically exempted from disclosure by statute." The report further noted that Restricted Data was "born classified" which meant that there is no administrative discretion to classify the information since it is by definition protected under the Atomic Energy Act. The Senate report recognized the inherent sensitivity of Restricted Data as well as of Communication Intelligence (18 USC 5798) and Intelligence Sources and Methods (50 USC 5403 (d)(3) and g) which are also protected by statute. The Senate report further noted that if these categories of information were ever subject to an in camera court review it would be under exemption (b)(1). Section 552(a)(4)(B)(ii) of the Senate bill as reported out of Committee established court review procedures for in camera inspection of information claimed to be exempt under (b)(1). These procedures, however, were struck during Senate floor debate.

The Senate receded on the rewording of exemption (b)(1) to make it clear that any information which is protected by statute shall be exempted under exemption (b)(3) and that if such information is ever subject to a court review, the court will recognize that the latitude for discretion permitted under Executive Order does not apply to such information.

House version exemption (b)(1)

"(b)(1) authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Senate receded on the rewording of exemption (b)(1).

Certain categories of information protected by statute, Restricted Data (42 U. S. C. 2162), Communication Intelligence (18 U. S. C. 798), and Intelligence Sources and Methods (50 U. S. C. 403(d)(3) and g), are "born classified" and exempted under exemption (b)(3) of the Freedom of Information Act. If such information is ever subjected to court review, it is expected that in such cases the court will recognize that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

Senate version exemption (b)(1)

"(b)(1) specifically required by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute."

The House receded on the rewording of exemption (b)(1).

Certain categories of information protected by statute, Restricted Data (42 U. S. C. 2162), Communication Intelligence (18 U. S. C. 798), and Intelligence Sources and Methods (50 U. S. C. 403(d)(3) and g), are "born classified" and exempted under exemptions (b)(3) as well as (b)(1) of the Freedom of Information Act. If such information is ever subjected to court review it is expected that in such cases, the court will recognize that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

COURT REVIEW

The Senate bill amended exemption (b)(1) to include information which is specifically required by statute to be kept secret in the interest of national defense or foreign policy. Under present law, exemption (b)(1) includes only information which is required to be kept secret pursuant to Executive Order. The House reworded exemption (b)(1) but did not expand it as did the Senate to include statutory protection. Rather, the House report noted that information which is protected by statute, such as Restricted Data (42 U. S. C. 2162), would still be protected under exemption (b)(3) "specifically exempted from disclosure by statute." The report introduced the concept that Restricted Data was "born classified." This means that there is no administrative discretion to classify the information since it is by definition protected under the Atomic Energy Act of 1954, as amended. The Senate report recognized the inherent sensitivity of Restricted Data and also of Communication Intelligence (18 U. S. C. 798) and Intelligence Sources and Methods (50 U. S. C. 403(d) (3) and g) which are also protected by statute. If these categories of information were ever subject to court review, the report noted that it would be under exemption (b)(1) and under the special court procedures provided in the Senate bill. These procedures, however, were struck during Senate floor debate.

The Senate receded on the rewording of exemption (b)(1) to make it clear that any information which is protected by statute shall be exempted under exemption (b)(3) and that if such information is ever subject to a court review, the court will recognize that the latitude for discretion permitted under Executive Order does not apply to such information.

House version exemption (b)(1)

"(b)(1) authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Senate receded on the rewording of exemption (b)(1).

Certain categories of information protected by statute, Restricted Data (42 U. S. C. 2162), Communication Intelligence (18 U. S. C. 798), and Intelligence Sources and Methods (50 U. S. C. 403(d)(3) and g), are "born classified" and exempted under exemption (b)(3) of the Freedom of Information Act. If such information is ever subjected to court review, it is expected that in such cases the court will recognize that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

Senate version exemption (b)(1)

"(b)(1) specifically required by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute."

The House receded on the rewording of exemption (b)(1).

Certain categories of information protected by statute, Restricted Data (42 U. S. C. 2162), Communication Intelligence (18 U. S. C. 798), and Intelligence Sources and Methods (50 U. S. C. 403(d)(3) and g), are "born classified" and exempted under exemptions (b)(3) as well as (b)(1) of the Freedom of Information Act. If such information is ever subjected to court review it is expected that in such cases, the court will recognize that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

13 June 1974

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Proposed language for conference report

for both House and Senate versions of exemption

(b)(1).

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Answers?